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No. 99-901

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

BRENTWOOD ACADEMY,
Petitioner,

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION
and RONNIE CARTER,
Executive Director and Individually,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENTS, TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION AND RONNIE CARTER

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INTRODUCTION

On August 23, 1997, the Tennessee Secondary School Athletic Association ["TSSAA"] found that Brentwood Academy, a voluntary member of the Association, had used undue influence to secure the attendance of several eighth-grade star student-athletes for athletic reasons, in violation of the TSSAA "recruiting rule." Eleven days earlier, Brentwood Academy had submitted the annual renewal form for its membership in TSSAA, agreeing to conduct its athletic programs in accordance with the rules and decisions of TSSAA. [Apx. pp. 284-93]. Just a few days after the TSSAA Board of Control made its decision, Brentwood Academy filed with TSSAA another annual form in which it agreed to comply with the provisions of the recruiting rule in full. (Apx. pp. 294-97). Unhappy with the TSSAA rules and decisions with which it agreed to comply, Brentwood Academy filed this lawsuit, using the federal courts and the Constitution of the United States as vehicles by which it could continue to reap the benefits of membership in TSSAA without fulfilling the agreements it made as a condition of that membership.

This case is about Brentwood Academy's desire to compete for TSSAA championships without playing by the TSSAA rules. Brentwood Academy, despite its relatively small enrollment, has been a high school football powerhouse. *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 180 F.3d 758, 760 (6th Cir. 1999). Brentwood Academy has won nine (9) TSSAA state football championships, usually playing against schools with much larger enrollment.

The TSSAA recruiting rule serves two important purposes. First, it prevents unscrupulous individuals

from treating athletically gifted children as commodities and luring those children to attend particular schools because they are athletically gifted, without regard to whether they will be well suited to the academic and social climates of the school. Second, the recruiting rule is a means that the member schools of TSSAA have chosen to keep the playing field level among competitors. Brentwood Academy, on the other hand, has no apparent interest in a level playing field. Brentwood Academy understandably likes its view from the top, and the recruiting of athletically gifted 13- and 14-year-old kids is one way for Brentwood Academy to remain there.

This case is not about the Tennessee State Board of Education or the physical education requirement in the public school curriculum approved by the State Board of Education. This case is not about any alleged desire by public schools to retain outstanding athletes. This case is not about Brentwood Academy attempting to convey its message. This case is not about weighty issues like school choice, free speech, or constitutional accountability. Although creatively wrapped in a constitutional package, this case is really about high school football playoffs and Brentwood Academy's desire to win TSSAA championships at any cost, playing by its own rules instead of the rules that the other 349 member schools of TSSAA have written for themselves and chosen to follow.

SUMMARY OF THE ARGUMENT

The legal issue in this case is whether TSSAA acted under color of state law for purposes of 42 U.S.C. §1983 when it enforced its recruiting rule against Brentwood Academy, a private school that voluntarily joined TSSAA

and agreed in its membership contract to comply with the TSSAA rules and decisions.

TSSAA is a private corporate entity. Membership in TSSAA is voluntary. Both public and private schools have chosen to join TSSAA. TSSAA establishes and enforces rules under which interscholastic athletic competition among its member schools is conducted. If a school does not wish to compete in accordance with the TSSAA rules, that school may refrain from joining TSSAA and may conduct its interscholastic athletic program in whatever fashion it sees fit.

When the facts are analyzed under the principles used by this Court over the last twenty years to determine when a private party may fairly be said to be acting under color of state law, the conclusion must be drawn that TSSAA is a private party. TSSAA's enforcement of the recruiting rule as to Brentwood Academy is a function of the contract Brentwood Academy voluntarily and freely entered into with TSSAA and not a product of any right, privilege, or power conferred upon TSSAA by state law. Accordingly, TSSAA did not act under color of state law for purposes of 42 U.S.C. §1983 when it enforced the recruiting rule upon a private school, Brentwood Academy, that voluntarily chose to subject itself to the TSSAA rules.

ARGUMENT

I. TSSAA DID NOT ACT UNDER COLOR OF STATE LAW, AS REQUIRED FOR LIABILITY UNDER 42 U.S.C. §1983, WHEN IT ENFORCED ITS RECRUITING RULE AGAINST BRENTWOOD ACADEMY.

A. TSSAA is a Private Party.

TSSAA is a private, not-for-profit corporation, formed in 1925 and incorporated as a private corporation under the laws of the State of Tennessee. As the Tennessee Supreme Court has held, membership in TSSAA is voluntary. *Tennessee Secondary School Athletic Association v. Cox*, 425 S.W.2d 597, 599 (Tenn. 1968). TSSAA operates from privately owned property located at 3333 Lebanon Road in Hermitage, Tennessee. Executive Director Ronnie Carter and his staff of employees run the day-to-day operations of TSSAA. TSSAA, and not the government of the State of Tennessee, employs Carter and the remaining staff. [R. 42, Ronnie Carter Dep. pp. 12, 272-73, 291-92, Apx. p. 267]. Carter and his staff supervise interscholastic athletic competition among TSSAA's secondary school members in football, volleyball, cross country, golf, tennis, soccer, basketball, wrestling, baseball, softball, and track. TSSAA member schools, both public and private, compete interscholastically in other sports unregulated by TSSAA. Both public and private schools compete for championships independent of TSSAA in some of these sports. *See e.g. http://www.hutchinsonschool. org.*; *http://www.gps.edu*. TSSAA operates on a budget of approximately 1.6 million dollars per year in gross receipts. These funds are derived primarily from gate receipts of tournaments and playoffs which TSSAA

sponsors for its member schools. Only 4% of TSSAA's annual gross receipts come from the membership dues paid by member schools, and none of TSSAA's annual gross receipts are derived from tax revenues. [R. 42, Ronnie Carter Dep. pp. 292, 295-298, Apx. pp. 268-69; R. 52 Jerome Saylors Aff., Apx. p. 210]. TSSAA receives no state government funding.

TSSAA does not schedule regular season interscholastic athletic contests, control the sites of regular season athletic contests, or receive any portion of proceeds generated from regular season athletic contests. [R. 42, Ronnie Carter Dep. p. 295, Apx. p. 268]. TSSAA only schedules the athletic contests in the tournaments it conducts. The winners of those tournaments earn the privilege of calling themselves TSSAA champions. TSSAA does not select tournament sites at the district or region levels. TSSAA does select the site for its state tournaments, which are held at both public and private facilities. For example, the TSSAA state championship football games, known as the "The Clinic Bowl," are conducted at Vanderbilt University, a private institution in Nashville. Twenty-eight percent of the remaining TSSAA state tournaments are also held at facilities on the grounds of private schools. Other tournaments, such as those in the spring sports, are held at sites determined by the city that is the successful bidder to host the tournaments. [R 42, Ronnie Carter Dep. p. 296, Apx. p. 268; R. 52, Ronnie Carter Aff., Apx. p. 200].

Like any other private entity, TSSAA must enter into a contract with the State of Tennessee when using a state-owned facility for the conduct of a championship tournament. TSSAA must register with the Sales Tax Division of the Tennessee Department of Revenue and must pay the same amusement and sales taxes assessed

to any other private taxpayer. When using a state-owned facility, TSSAA must furnish the same proof of insurance that is required for private users of such a facility and must agree to indemnify and hold harmless the state owner of the facility from all liabilities arising out of the use of the facility. [R. 52, Ronnie Carter Aff., Apx. p. 200].

Unlike government agencies of the State of Tennessee, there is no statutory authorization for the creation, existence, or operation of TSSAA. The Tennessee General Assembly has created and defined the powers and duties of the various administrative departments and divisions of state government. *See e.g.* Tenn. Code Ann. §§4-3-101, *et seq*. The statutes creating and empowering the various administrative departments of the government of the State of Tennessee include no mention of TSSAA. Instead, TSSAA has existed since 1925 by virtue of its private incorporation and has operated independently of the government of the State of Tennessee. [R. 42, Ronnie Carter Dep. p. 291, Apx. pp. 265-66].

No state law in Tennessee requires any school, public or private, to engage in interscholastic athletic competition at all, much less to join TSSAA. The Tennessee statutes pertaining to public education, contained in Title 49 of the Tennessee Code, are silent with regard to the regulation of interscholastic athletic competition. The only statute that addresses itself to interscholastic athletics at all is Tenn. Code Ann. §49-6-1002(a), passed in 1997 and made effective after the events giving rise to this case. That statute restricts public school principals and teachers from dismissing students during the regular school day to play interscholastic sports. The enactment of that statute reflects the General Assembly's understanding that interscholastic athletic competition

is not a part of the regular school program and ordinarily should not take up any part of the regular instructional day.[1]

TSSAA is a private entity in all respects. It operates from privately owned property. Its day-to-day operations are conducted by privately employed citizens. It receives no government funding. While its employees are permitted to participated in the Tennessee Consolidated Retirement System, the private corporation pays the employer contribution from its own private funds. For government employees who are members of the TCRS, the employer contribution is paid by the govern-

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[1] The Petitioner devotes considerable discussion to the State Board of Education requirements for "physical education" instruction in the public schools and for accreditation of private schools. *See* Brentwood Academy brief pp. 10-11, 15-16. It is true that SBE Rule 0520-1-3-.06 does give local school boards the discretion to substitute participation in interscholastic athletics and marching band for the physical education graduation requirement. [Apx. p. 243]. However, the promulgation of this rule reflects the understanding of the SBE that "physical education" does not ordinarily encompass interscholastic athletics. Were it otherwise, the authorization to local school boards to make that *substitution* would be unnecessary. The SBE rules describing the goals, rationale, and "strands" for the physical education curriculum mention games and sports, but make no mention of interscholastic athletics. [Apx. pp. 251-53].

TSSAA's rules and regulations do not extend to the physical education curriculum required under SBE rules. TSSAA's rules pertain only to sports competition between different schools, a distinctly extra-curricular (outside the regular curriculum) activity.

ment from public funds. [R. 42 Ronnie Carter Dep. pp. 271, 291-92, Apx. pp. 264-65, 266].[2]

TSSAA's power to enforce its rules as to Brentwood Academy does not flow from the State of Tennessee or from any statute or valid regulation of any state agency or any other act of the state. TSSAA's power to enforce its rules as to Brentwood Academy flows directly and solely from the voluntary membership contract which Brentwood Academy signed, under which it agreed to comply with the TSSAA rules and decisions in order to receive the opportunity to proclaim itself a TSSAA champion.[3] Brentwood Academy's contract is with a private entity, not the state.

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[2] TSSAA is one of three private associations, along with the Tennessee Education Association and the Tennessee School Boards Association, whose employees are statutorily permitted to participate in the Tennessee Consolidated Retirement System. Tenn. Code Ann. §8-35-118. Although the employees of those three organizations are not employees of the government, the General Assembly has recognized that the three organizations often draw employees from the teaching profession. The availability of participation in TCRS is a means by which the General Assembly has permitted members of the teaching profession to leave government employment and go to work for one of these associations without losing the ability to continue accruing retirement benefits under TCRS. However, the government does not pay any portion of the employer contribution for employees of those three associations who continue to participate in TCRS.[R.42 Ronnie Carter Dep. p. 271, Apx. pp. 264-65]

[3] *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374 (1995), relied upon extensively by the Petitioner in its brief, did not involve a determination that a private entity was acting under color of state law. Instead, the Court in *Lebron* concluded that Amtrak was in fact a government entity or agency. Amtrak

(Footnote 3 continued on next page)

B. TSSAA is Not a State Actor Under *Tarkanian*.[4]

In *NCAA v. Tarkanian*, 488 U.S. 179 (1988), this Court held that a private athletic association did not act under color of law when enforcing its rules against a member school. The analysis of the NCAA in *Tarkanian* applies with equal force to TSSAA. Like members of the NCAA, TSSAA members agree when joining the association that they will abide by the TSSAA rules. *Tarkanian*, 488 U.S. at 183. These rules, like NCAA rules, govern the conduct of interscholastic athletic competition among the association's members and include limitations on the recruiting of student-athletes. *Id.* Like the NCAA, TSSAA uses enforcement procedures that are an essential part of its effective functioning. *Id* at 184. The source of TSSAA's rules and enforcement procedures, like the source of the NCAA's

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(Footnote 3 continued)

was established by Congress, its structure and powers statutorily decreed by Congress. *Id.* at 383-87. Its directors were government appointees. *Id.* at 385. The Court held:

> "We hold that where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment." *Id.* at 400.

TSSAA was not created by special law for the furtherance of governmental objectives, nor does the state have permanent authority to appoint a majority of the Council or Board members. *Lebron* has no application here.

4 Where a deprivation of rights under the Fourteenth Amendment is alleged, the "state action" and "under color of state law" requirements converge. *Lugar v. Edmondson Oil Company*, 457 U.S. 922, 935 n. 18 (1982).

"legislation," is the collective membership of the association. *Id.* at 193. While public school members have certainly had some impact on TSSAA's promulgation of its rules, it must be assumed that independent and parochial school members of TSSAA have participated as well in the promulgation of those rules. *Id.*[5]

In *Tarkanian*, a state institution's adoption of the NCAA's rules to govern its own behavior did not transform the NCAA into a state actor. *Id.* at 194. Drawing an analogy to *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), this Court stated that the ABA's formulation of disciplinary rules was not state action even though the State Supreme Court adopted those rules in toto and enforced them against its members, since the State Supreme Court "retained plenary power to reexamine those standards and, if necessary, to reject them and promulgate its own." *Id.* Similarly, the State Board of Education has presumably retained the power to reexamine the TSSAA rules and, if necessary, to reject those rules and promulgate its own. This Court noted:

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[5] There is no evidence in the record that the state caused the adoption of the recruiting rule, nor is there any evidence of the makeup of the TSSAA Legislative Council when the rule was adopted. Accordingly, there is no evidence in the record to support a finding of state action in the actual promulgation of the TSSAA recruiting rule. *See e.g. Burrows v. Ohio High School Athletic Association*, 891 F.2d 122 (6th Cir. 1989) (no evidence that the adoption of OHSAA's rule in question was caused, controlled, or directed by the state or its agencies, and hence no state action in the adoption of that rule). Some of the printed guidelines used for interpreting and understanding the "recruiting rule" were developed in part by a Legislative Council member who was the headmaster of a private school and served as Vice President of the Council. [R. 42, Ronnie Carter Dep. p. 294, Apx. p. 267].

> "So here, UNLV retained the authority to withdraw from the NCAA and establish its own standards. The University alternatively could have stayed in the Association and worked through the Association's legislative process to amend rules or standards it deemed harsh, unfair or unwieldy." *Id.* at 194-95.

Similarly, Brentwood Academy or any other TSSAA member school can withdraw from TSSAA and establish its own standards, or alternatively can stay in TSSAA and work to amend rules that appear harsh, unfair, or unwieldy.

Like the NCAA, TSSAA enjoys no governmental powers to facilitate its investigations, such as the power to subpoena witnesses, impose contempt sanctions, or assert sovereign authority over any individual. *Id.* at 197. While TSSAA imposed a fine upon Brentwood Academy, Brentwood Academy never found it necessary to seek any sort of stay since TSSAA had no power to levy an execution to collect the fine. Almost three years later, the fine remains unpaid.

This Court acknowledged in *Tarkanian* that the NCAA's membership included virtually all public and private universities and four-year colleges conducting major athletic programs in the United States. *Id.* at 183. Yet, the Court rejected Tarkanian's assertion that the power of the NCAA was so great that UNLV had no practical alternative to compliance with NCAA legislation, stating:

> "[E]ven if we assume that a private monopolist can impose its will on a state agency by a threatened refusal to deal with it, it does not follow that such a

private party is therefore acting under color of state law." *Id.* at 198-99.

This Court properly recognized that the undesirability of withdrawing from membership in the NCAA and losing the ability to compete for NCAA-sponsored championship's did not make the option of withdrawal non-existent. *Id.* at 198 n. 19. It is equally true that while it may be unpalatable to Brentwood Academy to withdraw from TSSAA and no longer be in a position to garner the fame of a TSSAA football championship, Brentwood Academy nonetheless retains the option of withdrawing from TSSAA if it does not wish to comply with the TSSAA rules. It can join another existing association like the Tennessee Athletic Association of Christian Schools (TAACS), play as an independent school without joining any association, or elect not to conduct an interscholastic athletic program at all. In fact, Brentwood Academy has previously encouraged an *en mass* withdrawal of private schools from TSSAA in order to form a separate association. [R. 42 Bill Brown Dep. pp. 61-63, Ex. 10].

Ultimately, the issue in *Tarkanian*, and the issue in general in the state action analysis, was whether the power exercised by the private entity flowed from the state. Plainly in *Tarkanian* it did not. Similarly, the power exercised by TSSAA when enforcing its recruiting rule did not flow from the State of Tennessee. It flowed from Brentwood Academy's contract with TSSAA.

C. Footnote 13 in *Tarkanian* Does Not Require A Different Result.

Brentwood Academy points to one sentence of footnote 13 in *Tarkanian* as dispositive of the state

action issue here. Brentwood Academy brief pp. 30-39. After recognizing that the source of the NCAA's rules was not a particular state, Nevada, but was the collective membership speaking through an organization independent of any particular state, this Court stated in a footnote:

> "The situation would, of course, be different if the membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign.... The dissent apparently agrees that the NCAA was not acting under color of state law in its relationships with private universities, which constitute the bulk of its membership." 488 U.S. at 193 n. 13 (citations omitted).

This footnote did not affect the outcome in *Tarkanian*. Moreover, the Court was addressing a hypothetical situation in the footnote, and was not "sifting facts and weighing circumstances" as required when determining whether private conduct constitutes state action. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961). By sifting the facts and weighing the circumstances, it is clear that TSSAA, a private entity, did not act under color of state law when it enforced its recruiting rule against Brentwood Academy, a voluntary member school that agreed by contract with TSSAA to comply with the TSSAA rules and decisions.[6] Cer-

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[6] The first sentence of footnote 13 dealt with the source of the association's rules. There is no evidence in the record to support a finding of state action in the promulgation of the TSSAA recruiting rule in any event. *See* footnote 5, *supra*.

tainly the mere fact that all of an association's members come from a single state, and a number of those members happen to be government employees or public institutions, does not render all other facts and circumstances irrelevant in the state action analysis.

In a state where the government has assumed responsibility for the regulation of interscholastic athletics and has either created an agency to serve that function or has statutorily appointed an association to serve the function, footnote 13 may apply. However, that footnote likely was not written in anticipation of a situation like that in Tennessee, where the state has stayed out of the regulation of interscholastic athletics.

Ultimately, two elements are necessary to establish that an act was undertaken under color of state law. First, there must be a constitutional deprivation caused by the exercise of a right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible. This is another way of saying that the power exercised must flow from, or have its source in, the state. Second, the party charged with the deprivation must be someone who may fairly be said to be a state actor so that the unconstitutional conduct is fairly attributable to the state itself. *American Manufacturers Mutual Insurance Company v. Sullivan*, 526 U.S. _____, 119 S.Ct. 977, 143 L.Ed.2d 130, 143-44 (1999); *Lugar v. Edmondson Oil Company*, 457 U.S. 922, 937 (1982). A person acts under color of state law for purposes of 42 U.S.C §1983 only when exercising power possessed by virtue of state law and made possible only because the person is clothed with the authority of state law. *Polk County v. Dotson*, 454 U.S. 312, 317-18 (1981)(quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)).

The facts and circumstances do not suggest that TSSAA, when enforcing the recruiting rule against Brentwood Academy, exercised power possessed by virtue of state law or made possible only because it was clothed with the authority of state law. There is no state law or rule of conduct giving TSSAA the power to enforce its rules against a private member school like Brentwood Academy. That power grows solely out of the contract between TSSAA and Brentwood Academy. It is power not made possible because TSSAA is clothed with any authority of state law. It is power made possible only because Brentwood Academy voluntarily elects to join TSSAA and agrees to comply with its rules and decisions. TSSAA did not act under color of state law when it enforced its recruiting rule against Brentwood Academy.[7]

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[7] Brentwood Academy treats the first sentence of footnote 13 as the defining statement in the entire *Tarkanian* decision, while discounting the significance of the second sentence of the same footnote. In fact, when the gravamen of the complaint is considered, namely that TSSAA acted contrary to the constitution when it enforced the recruiting rule against Brentwood Academy, the second sentence of footnote 13 in *Tarkanian* becomes more significant than the first. Regardless of any purported relationship between TSSAA and the State Board of Education ("SBE"), the SBE has no power or authority to govern or control the interscholastic athletic program of a private school like Brentwood Academy. Accordingly, even if the State of Tennessee had legislatively conferred upon TSSAA authority over interscholastic athletics in the public schools, TSSAA's relationship with Brentwood Academy would still remain one that grows purely out of contract. Thus, the source of TSSAA's power to enforce the recruiting rule against Brentwood Academy would remain unchanged, regardless of whether public schools were voluntary members of TSSAA or involuntary members of TSSAA.

II. TSSAA DID NOT ACT UNDER COLOR OF STATE LAW UNDER ANY OF THE TESTS CUSTOMARILY UTILIZED BY THIS COURT.

A. TSSAA Does Not Perform A Function That is Traditionally And Exclusively Reserved To The State.

The Sixth Circuit correctly concluded under the public function test that TSSAA was not a state actor because it did not exercise powers which are traditionally and exclusively reserved to the state. 180 F.3d at 763. The conduct of interscholastic athletics in Tennessee is not traditionally and exclusively reserved to the state. The State of Tennessee has never regulated interscholastic athletic competition. For the first 47 years of TSSAA's existence, the State of Tennessee undertook no role with respect to the coordination of interscholastic athletic competition. In 1972, without any legislative authorization and without TSSAA's consent, the State Board of Education adopted a resolution designating TSSAA as the organization to supervise and regulate the interscholastic athletic activities of the public junior and senior high schools in Tennessee. [R. 52, August 25, 1972, State Board of Education minutes]. Still, TSSAA never sought State Board of Education approval of its rules or by-laws, and the State Board of Education did not attempt to control the operation of TSSAA and only occasionally took action to ceremonially approve TSSAA rules. [R. 42, Ronnie Carter Dep. pp. 266-67; R. 52 Aff. of Jerome Saylors, Apx. p. 210]. At no time did the State Board of Education consider the recruiting rule in particular or any TSSAA rule in detail. [Apx. pp. 157-61, 163-65]. In 1996, prior to the events giving rise to this action, the State Board of

Education changed its rule such that it thereafter simply authorized the public schools of Tennessee to voluntarily maintain membership in TSSAA. [Administrative Rule 0520-1-2-.08 of the State Board of Education, Apx. pp. 172-174].

The mere approval of or acquiescence in the actions of the private party by the state is not sufficient to convert the private party's action into state action. *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982). Even extensive and detailed state regulation would not convert the private entity's actions into state action. *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982); *Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 350 (1974). The fact that a private entity performs a public function does not makes it acts state action, absent a showing that the function has been traditionally the exclusive prerogative of the state. *Rendell-Baker*, 457 U.S. at 841; *Blum*, 457 U.S. at 1011; *Jackson*, 419 U.S. at 353. Even if interscholastic athletic competition were assumed to be a public function based on the attempted analogy to "physical education," TSSAA's regulation of that function would not convert its action into state action. There is no evidence that the state of Tennessee has ever regulated interscholastic athletic competition at all, much less exclusively.

The absence of the feature of exclusivity is fatal to the public function theory of state action. *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 159 (1978). The SBE's ceremonial approval of TSSAA's rules between 1972 and 1995 does not add the feature of exclusivity needed to convert TSSAA's action into state action. This action by the SBE represented, at most, acquiescence in TSSAA's actions. *See Flagg Brothers*, 436 U.S. at 164-65. Where the SBE has not put its own weight on the

side of the rules by ordering them, its approval of the rules will not transmute TSSAA's enforcement of its own rules into state action. *Jackson*, 419 U.S. at 357.

In order to avoid the absence of exclusivity, the Petitioner relies upon the theory that the state has delegated to TSSAA the authority TSSAA exercises. *See* Brentwood Academy brief pp. 39-46. It is true that the government cannot avoid its constitutional accountability by delegating to private parties the provision of services that a state's constitution or statutory scheme obligates the state to provide. *Sullivan*, 143 L.Ed.2d at 130. However, what is missing from the petitioner's argument is the underlying requirement of a constitutional or statutory obligation imposed upon the state. Neither the constitution of Tennessee nor any Tennessee statute imposes upon the state or any local government entity an obligation to provide for interscholastic athletic competition at all, much less for the coordination of that competition provided by TSSAA.

The Supreme Court of Tennessee has determined that the constitution of Tennessee imposes a duty upon the state to maintain a system of public education. However, no court in Tennessee has ever construed the constitution to impose upon the government a duty to provide for any particular types of extracurricular activities in the public schools. Instead, the Supreme Court of Tennessee has held that high school students in Tennessee have no legally recognized right to participate in interscholastic athletics. *Tennessee Secondary School Athletic Association v. Cox, supra*, 425 S.W.2d at 602. There is no federal constitutional right to education. *Martinez v. Bynam*, 461 U.S. 321 (1983); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). There certainly is no constitutional right

to attend a private school like Brentwood Academy, and as the Sixth Circuit has repeatedly held, there is no constitutional right to participate in interscholastic athletics. *Horner v. Kentucky High School Athletic Association*, 43 F.3d 265 (6th Cir. 1994); *Burrows v. Ohio High School Athletic Association, supra*; *Hamilton v. TSSAA*, 552 F2d 681 (6th Cir. 1976).

B. The State Has Not So Coerced Or Encouraged TSSAA To Act That the Choice Of TSSAA Must Be Regarded As That of the State.

The Sixth Circuit rejected Brentwood Academy's contentions under the "state compulsion" test, noting that the Tennessee legislature had never mentioned TSSAA, much less given it any authority. 180 F.3d at 763-64. The SBE's 1972 administrative rule, upon which the Petitioner heavily relies, does not establish state compulsion. The SBE rule was not promulgated until 1972, after TSSAA had been performing its function for 47 years. The rule did not alter the way in which TSSAA conducted its business.

The rule was repealed and replaced by a new rule, simply authorizing the public schools of Tennessee to join TSSAA, prior to any of the events giving rise to this action. Even if the rule suggested that the state somehow regulated TSSAA's conduct for the 24 years in which the rule existed, such regulation, even if extensive and detailed, would not convert TSSAA's action into that of the state. *Blum*, 457 U.S. at 1004; *Rendell-Baker*, 457 U.S. at 841; *Jackson*, 419 U.S. at 350. Similarly, the fact that TSSAA receives some funds from gate receipts generated through tournaments held in publicly-owned facilities or from

dues paid by public school members does not establish state action. Substantial or even total dependence upon state funding would not render TSSAA's enforcement of the recruiting rule an act of the state. *Rendell-Baker*, 457 U.S. at 841.

In any event, there is no evidence that the state played any part in TSSAA's enforcement of the recruiting rule against Brentwood Academy. The state neither coerced nor encouraged TSSAA's enforcement in any way, and thus certainly did not "compel" the private action TSSAA took here.

C. No Symbiotic Relationship Exists Between TSSAA and the State.

The third test of state action examined and rejected by the Sixth Circuit was the "symbiotic relationship" test. The Sixth Circuit correctly noted that a symbiotic relationship exists only when there is a sufficiently close nexus between the state and the challenged action of the private party so that the action of the private party can be fairly treated as that of the state. Neither extensive regulation nor state funding of a private entity is sufficient to support a finding of a symbiotic relationship. Relying on its earlier decision in *Burrows*, the Sixth Circuit held that there was no proof that TSSAA's enforcement of its recruiting rule against Brentwood Academy was caused, controlled, or directed by the state or its agencies. 180 F.3d at 764.

The Petitioner erroneously relies upon the symbiotic relationship analysis in *Burton*. In *Jackson*, this Court limited the holding of *Burton* to its peculiar facts, involving a private lessee of public property. *Jackson*, 419 U.S. at 357-58. In addition, where a privately

owned enterprise is providing a service that the state would not necessarily provide, even though under contract with or extensively regulated by the state, that enterprise does not fall within the ambit of *Burton. Blum*, 457 U.S. at 1011.

TSSAA was not acting as a lessee of public property when it enforced its recruiting rule. While TSSAA may occasionally lease public property for the conduct of championship tournaments, there is no relationship between the lease and the act at issue, enforcement of the recruiting rule. There is no claim that TSSAA somehow acts in a discriminatory fashion when it conducts its state championship tournaments. There is no evidence that the state somehow derives monetary benefit, as an occasional lessor of public property to TSSAA, from TSSAA's enforcement of its recruiting rule. The mere fact that TSSAA signs a contract with the state to use a publicly-owned facility for a tournament does not deliver the "symbiotic relationship" test to the Petitioner. Otherwise, a one-time lessee of public property could be sued under §1983 for any alleged unconstitutional act, regardless of how unrelated that act might be to the lease of public property.

D. TSSAA Is Not A Joint Participant in State Action.

At the time the recruiting rule was enforced against Brentwood Academy in 1997, the elected members of the TSSAA Board of Control held jobs as principals of public schools. In insisting that this fact is dispositive of the state action issue, the Petitioner apparently relies upon the "joint participation" theory of state action found under *Lugar v. Edmondson Oil Company*, 457 U.S. 922 (1982), in the context of misuse of the state's

attachment statutes. In *Lugar* the Court found state action to exist because the pre-judgment attachment in question was obtained pursuant to state law, and state officials actually attached the property, so that there was action by the state or its agents jointly with the private party. *Id.* at 941-42. However, the existence of a state-enforced law or a custom having the force of law is essential to a determination that a private person is liable as a joint participant with the state in an unconstitutional act. *Adickes v. S.H. Kress & Company*, 398 U.S. 144, 173-74 n. 44 (1970).

It is true that an individual must be a principal or assistant principal (or headmaster) of a member school to be eligible for election to the Board of Control or Legislative Council. It is also true that some Board of Control meetings are held on school days, although the Petitioner's assertion that schools "typically" reimburse their principals for attending such meetings finds no support in the record excerpts cited. *See* Brentwood Academy brief p. 6. Given these facts, Brentwood Academy's suggestion that the presence of public school principals on the Board of Control creates "joint participation" has some superficial appeal.

However, a distinction must be made between eligibility for the Board and function as a member of the Board. As the Petitioner acknowledges, the determination of whether an organization controlled by public employees acts under color of state law is based on a functional analysis. Brentwood Academy brief p. 34. When serving on the Board of Control, an individual is not functioning as the principal of a school. The statutory duties of a public school principal include no reference to interscholastic athletics. *See* Tenn. Code Ann. §49-2-303(b). A Board of Control member, elected by the

heads of other member schools both public and private, functions in a representative capacity. The Board member represents the interests of every school, public or private, in the district from which that member is elected. *See Whitcomb v. Chavis*, 403 U.S. 124, 141 (1971); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). Whether the Board member's job is as principal of a public school or headmaster of a private school makes no difference in the functional analysis.

Just as shareholders in a for-profit corporation elect the Board of Directors, the members of TSSAA elect the Board of Control. The Board of Control functions in a representative capacity. Brentwood Academy's suggestion that the public or private status of the school at which those representatives are employed is determinative of TSSAA's state actor status would lead to confusing and inconsistent results. For example, if, unlike Brentwood Academy Headmaster Bill Brown, a substantial number of principals or headmasters at other private TSSAA member schools sought election to the Board of Control and succeeded in filling a majority of those seats, TSSAA would no longer be a state actor. If a majority of the members of the Legislative Council were public school principals, and a majority of the members of the Board of Control were private school principals, TSSAA would be a state actor when enacting its rules but not when enforcing those rules. Taken a step further, the Petitioner's analysis would require the conclusion that a public school principal serving as a game official in a TSSAA basketball tournament could be subject to constitutional challenge on the theory that his job as a public school educator rendered him a "state actor" when engaging in a TSSAA-related endeavor. A coach holding a player out of a game due to an unre-

solved eligibility issue would be a "joint participant" with TSSAA in state action. This sort of confusion might be acceptable to Brentwood Academy if it means a victory in this case, but it would only add to the difficulty of the state action analysis to be performed by the lower courts in subsequent cases. Moreover, Brentwood Academy's analysis would foster chaos in the conduct of interscholastic athletics in Tennessee.

Certainly more than the mere involvement of an individual who holds government employment is necessary to convert the act of a private entity into state action. It is the function served by that individual that determines whether he is acting under color of state law. Indeed, Brentwood Academy's argument wholly ignores the nature of representative government. In any organization with a representative form of governance, there are likely to be minority groups. The Petitioner's argument is that a minority group can only be represented if its elected representative is also a member of that minority group. Applied to government, the Petitioner's argument would require a presumption that a white congressman elected from a congressional district where the majority of the population is white cannot represent the interests of his African-American constituents. A United States Senator, required to be 30 years of age or older to qualify for election, would be presumed unable to represent the interests of those under 30.

But the congressman does not serve as a white male, he serves as a congressman. The senator does not serve as a 30-year-old, he serves as a senator. The Board of Control members do not serve as principals of public schools or private schools. They serve as Board of Control members. Simply because there are more

public school members in TSSAA than there are private school members, there is statistically a greater likelihood that a majority of the members of the Board of Control, at any given time, will be principals of public schools. That fact does not render TSSAA a state actor.[8]

III. THE STATE ACTION ANALYSIS: FROM WHENCE DOES THE POWER FLOW?

Under the various tests for state action that have been used by the courts, the source of the power exercised by the private entity determines the outcome. The various tests provide vehicles for answering the question: From whence does the power flow? If the power exercised by the private entity flows directly from the state, and the private party is a person who may fairly be said to be a state actor so that the conduct may be fairly attributable to the state, then the private entity acts under color of state law. *Sullivan*, 143 L.Ed.2d at 143-44.

Sifting through the facts and circumstances, it is clear that TSSAA's power to enforce the recruiting rule against

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[8] The Petitioner and *amici curiae* in support of the Petitioner suggest that there is some tension between public schools and private schools because of a theoretical desire by public schools to prevent students with athletic prowess from attending private schools or a desire by public school officials to prevent private schools from effectively offering private educational alternatives. These are broad and sweeping philosophical generalizations that cannot be supported by some isolated comment of one public school principal that might be found somewhere in the record. These assertions by the Petitioner are more evidence of the Petitioner's generalized prejudice toward public schools than of any pervasive public school prejudice against private schools.

Brentwood Academy did not flow from the state. The power did not have as its source a right or privilege created by the state. The source of the power exercised by TSSAA as to Brentwood Academy in 1997 was the contract between TSSAA and Brentwood Academy.

In *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 482 U.S. 522 (1987), this Court stated that "[n]either the conduct nor the coordination of amateur sports has been a traditional government function." *Id.* at 545. The Court held that the USOC's enforcement of its exclusive right to the word "Olympic" did not violate the Fifth Amendment because the USOC was not a government actor to which constitutional prohibitions applied.

The USOC is a federally created private corporation. Congress granted the USOC a corporate charter, imposed various requirements upon the USOC, and provided for USOC funding through the exclusive use of Olympic words and symbols and through direct grants. *Id.* at 542-43. The activities performed by USOC serve a national interest, as its purpose of incorporation indicates. *Id.* at 544. Nonetheless, this Court found that the USOC's enforcement of its right to the use of the word "Olympic" was not governmental action. Reiterating that the government normally could be held responsible for a private decision only where the government exercised coercive power or provided such significant encouragement that the choice must in law be deemed to be that of the government, the Court stated:

> "The USOC's choice of how to enforce its exclusive right to use the word 'Olympic' simply is not a governmental decision. There is no evidence that the Federal Government coerced or encouraged the

> USOC in the exercise of its right. At most, the Federal Government, by failing to supervise the USOC's use of its rights, can be said to exercise 'mere approval of or acquiescence in the initiatives' of the USOC. This is not enough to make the USOC's actions those of the government." *Id.* at 547 (citations omitted).

The Court found no evidence that the government could or did exert any influence over the exercise of USOC's enforcement decision, and that there was therefore no evidence of a close nexus between the government and the challenged actions of the USOC. *Id.* at 547 n. 29.

This Court's analysis in *San Francisco Arts & Athletics* applies with equal force in this case.[9] There is no evidence here that the state exerted any influence over the exercise of TSSAA's enforcement decisions as to Brentwood Academy. There is no evidence that the state exercised coercive power or provided such significant encouragement in the enforcement decision that the decision must in law be deemed to be that of the state. And TSSAA has fewer regulatory and financial connections with the state in this case than existed between the government and the USOC. There are no facts which warrant treating the enforcement of the recruiting rule as to Brentwood Academy by TSSAA, a private party, as action taken under color of state law. TSSAA's choice of how to enforce its recruiting role "simply is not a governmental decision." *Id* at 547.

From whence did TSSAA's power to enforce its rule as to Brentwood Academy flow? It flowed from a private

[9] Brentwood Academy omits all mention of this Court's decision in *San Francisco Arts & Athletics* in its brief.

contract between private parties. It did not flow from the state.

IV. THE PETITIONER OFFERS NO COMPELLING POLICY REASON TO EXPAND THE STATE ACTION CONCEPT TO REACH TSSAA.

TSSAA is a private entity. Constitutional constraints should be imposed upon a private entity like TSSAA only with caution. In *Lugar*, this Court stated:

> "As a matter of substantive constitutional law the state-action requirement reflects judicial recognition of the fact that 'most rights secured by the Constitution are protected only against infringement by governments.' . . . . Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order." 457 U.S. at 936 (citations omitted).

As previously discussed, the 1972 State Board of Education Administrative Rule is not a basis for a finding of state action by TSSAA. The attempted analogy between interscholastic athletics and the physical education curriculum, a part of the public function argument, does not support a finding that TSSAA is a state actor. The symbiotic relationship analysis is unavailing to the

Petitioner. The fact that non-membership in TSSAA and the resulting inability to compete for TSSAA championships is unpalatable to a high school football power like Brentwood Academy does not convert TSSAA's enforcement of the recruiting rule into state action. TSSAA's limited receipt of funds from public sources does not render its enforcement of the recruiting rule an act of the state. Occasional ceremonial approval by the SBE of the TSSAA rules does not transmute TSSAA's enforcement of its rules into state action. Without any constitutional or statutory obligation imposed upon the state to provide for the regulation of interscholastic athletic competition or any other extracurricular activity, the asserted delegation of authority by the State Board of Education to TSSAA is unavailing to the Petitioner. And the election of Board of Control members who are public school principals does not establish state action.

After sifting the facts from the Petitioner's arguments and theories, the Petitioner is left simply with policy reasons why TSSAA should purportedly be found to be a state actor. The Petitioner and various *amici curiae* in support of the Petitioner express concern over a possible lack of "accountability" if TSSAA is not found to be a state actor. *See* Brentwood Academy brief, pp. 26-27. However, there is no general law or rule of constitutional accountability. Instead, where a private actor is concerned, the general rule is that there is no constitutional accountability unless state action is found. The Constitution leaves a substantial area of freedom without constitutional restraint.

The "accountability" concern also ignores reality. A public school student who suffers discrimination as a result of her school's decision to follow a particular

TSSAA rule can pursue an action against the public school she attends under §1983 or Title IX. *See e.g. Tarkanian* (UNLV subject to suit under §1983 even though NCAA was not). Just as the Petitioner and others rely upon the large number of public schools in TSSAA's membership to support their arguments, they must also acknowledge that the potential for constitutional liability among those schools due to following a TSSAA rule would likely lead to either an *en mass* withdrawal from the association or an amendment of the rule.

Among private schools, students retain the right to seek relief under Title IX from a school that receives federal funds. Admittedly, a private school student may not enjoy a full range of constitutional protections. That is by design of those who establish a private school like Brentwood Academy and by choice of the parents who enroll their children there. However, it is illogical to suggest that the student's range of constitutional rights should be expanded simply because the school voluntarily joins TSSAA. The result would be that such a student would enjoy constitutional protection of her "right" to play basketball if her school joined TSSAA, but not if the school elected to compete without joining TSSAA. The student whose private school joined TSSAA would be afforded greater rights on the athletic field than in the classroom.

Simply put, students do not lose any rights they would otherwise have simply by virtue of the decisions of their schools to join TSSAA. What the Petitioner and *amici curiae* on behalf of the Petitioner propose is not a preservation of student rights that may otherwise be lost, but instead an expansion of student rights. There is no presumption in the law to suggest that any activity

which a given individual might deem important should be treated as a right subject to constitutional protection.

Finally, the Petitioner suggests that a decision in TSSAA's favor here would upset settled law because a number of courts have previously held that state high school athletic associations were state actors. The fact that a number of lower courts may have previously assumed or held that state high school athletic associations were state actors, generally without conducting any real analysis of the issue, is no reason for this Court to hold TSSAA to be a state actor. In *Tarkanian* this Court noted that for years the federal courts of appeals had held that the NCAA was a state actor under §1983, until the Court's decisions in *Lugar*, *Rendell-Baker* and *Blum* led the lower courts to reconsider. *Tarkanian*, 488 U.S. at 182 n. 5. Just as this Court's 1982 state action decisions caused lower courts to re-examine the state actor status of the NCAA, re-examination of the state actor status of state high school athletic associations is also warranted. Indeed, as the brief of *amici curiae* State Interscholastic Associations, et al., reflects, the variations in organizational structure and state government involvement from one association to another counsel against the sort of blanket rule proposed by the Petitioner, a rule that would be made without the necessary sifting of facts and weighing of circumstances and without attention to the gravamen of the complaint.

V. THE DANGER OF EXPANDING THE STATE ACTION CONCEPT.

Contrary to the "accountability concern" expressed by the Petitioner, this Court has recognized that "our political order" requires that courts respect the limits of their authority over

private interests. The Petitioner urges a finding of state action that departs from the principles this Court has used to insure that constitutional requirements are imposed only upon those whose conduct may be fairly attributed to the state. Instead, the Petitioner urges this Court to find TSSAA to be a state actor because the elected members of its Board of Control are principals of public schools.

The ramifications of finding state action based on the makeup of the Board of Control are dangerous. Each year TSSAA, like its counterparts in other states, makes hundreds of eligibility determinations with respect to individual student-athletes. A holding that TSSAA is a state actor would convert each of those eligibility determinations into a potential constitutional claim in the federal courts. The rationale supporting the Petitioner's state action argument could be extended to encompass the decisions of game officials who happen to be employed as public school teachers. It could encompass decisions by coaches at public schools about whom to cut from the roster and whom to play at what position in any given athletic contest. Essentially, every matter involving interscholastic athletics at public schools could give rise to a constitutional claim because of a public employee's role in the decision-making process.

But the ramifications of the Petitioner's argument extend far beyond interscholastic athletics. There are any number of high school extracurricular activities and competitions in which administrative bodies have greater numbers of individuals employed in the public schools than in the private schools, simply because there are more public secondary schools. There are many organizations that foster activities, enforce rules,

and sponsor extracurricular competition between schools in agriculture, mathematics, music, marching band, forensics, moot court, cheerleading, and other activities. Under the Petitioner's proposed test for state action, the presence of a majority of public school employees on the governing body of the organizations sponsoring these competitive extracurricular activities would require a finding of state action. Constitutional protection would extend to participation in virtually any extracurricular activity, opening the floodgates of potential litigation arising out of extracurricular activities.

A determination that TSSAA is a state actor would also leave existence of a constitutional claim pertaining to extracurricular activities like sports, band, or even the chess club, to be determined based upon the employment status of those in governing positions at any given time. What might appear as a constitutional claim today could be rendered a claim without constitutional recourse next year if enough private school employees are elected to form a majority on the Board of Control. Then again, even if five of the nine Board of Control members were private school principals or headmasters, a six to three vote to take action against a member school for violating the recruiting rule could still be construed as state action if public school principals represented a majority of those voting to take the action.

Amicus curiae Tennessee Lawyers' Association for Women mentions *Crocker v. TSSAA* as a case which evidences a pattern of bad behavior on TSSAA's part. In fact, *Crocker v. TSSAA* arose out of the efforts of a family to avoid the effect of the TSSAA transfer rule on their child. Although the child plainly changed schools for reasons related to athletics, the parents of that child attempted to utilize the Individuals with Disabilities

Education Act, 20 U.S.C. §§1400 *et seq.*, to get around the TSSAA eligibility rules. The *Crocker* litigation found its way to the Sixth Circuit four times. On the last occasion, affirming a grant of summary judgment to TSSAA after young Michael Crocker had managed to play throughout his high school years by virtue of two improvidently granted restraining orders, the Sixth Circuit said:

> "Although under the circumstances the organization [TSSAA] may appear stubborn and inflexible in its conduct, it is ordinarily entitled to enforce its athletic rules in order to deter students, parents and school officials from trying to turn high school athletics into an activity that overshadows or unduly interferes with academic life. The main purpose of high school is to learn science, the liberal arts and vocational studies, not to play football and basketball." *Crocker v. TSSAA*, 980 F.2d 382, 386-87 (6th Cir. 1992).

It required four trips to the Sixth Circuit before that Court finally perceived that the plaintiff in *Crocker* was utilizing a well-intended federal law simply as a vehicle to avoid having to comply with TSSAA rules. It took four visits to the Sixth Circuit before The Honorable Nathanial R. Jones, Sixth Circuit Judge, who sat on the panel for each of the four appeals, questioned in oral argument what the founding fathers of our country would think if they saw how the federal court system was being put to use.

This case, although brought by a school instead of a student, surely represents the same problem the Sixth Circuit identified in *Crocker*. It is a problem that is fast becoming endemic to life in America. Athletes are

becoming the most recognized and admired members of society. Athletics have become, in many segments of society, the new religion. The passion and emotion that accompanies athletic participation can sometimes lead to extraordinary measures, like those taken by the Crocker family and like those taken in this case by Brentwood Academy. A decision that TSSAA is a state actor will have ramifications across the country and will undoubtedly lead to a proliferation of federal court litigation over high school sports.

Ultimately, the state action inquiry is not only about whether a private entity like TSSAA can be held to constitutional standards, but also about whether the state can be held accountable for the private entity's conduct. Although the state was not sued by Brentwood Academy in this case, a determination that TSSAA acted under color of state law would undoubtedly invite direct government intervention in the coordination of interscholastic athletic competition among the public schools. Certainly the government is not likely to accept potential liability for the acts of TSSAA and, at the same time, continue to acquiesce in TSSAA's control over those situations giving rise to that liability. The result would be that a private system that has worked quite well for 75 years would be converted into a new form of governmental regulation with increased bureaucracy, increased potential for abuse of power, and increased public expense. The bureaucracy and expense would be substantial as states like Tennessee would not only assume responsibility for rule enforcement for all types of extracurricular activities, but they would also have to undertake legal review of all rules and all enforcement decisions and would have to finance the defense of their actions in federal court. And of course, another likely

result would be the total exclusion of private schools from all interscholastic competition with the public schools, since the state would not likely accept potential constitutional liability to a school like Brentwood Academy over which it has no governmental authority.

Constitutional standards should only be invoked "when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." *Blum*, 457 U.S. at 1004 (emphasis in original). A state normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State itself. *Id.*; *McCormack v. National Collegiate Association*, 845 F.2d 1338, 1346 (5th Cir. 1988). The fact that many or even a majority of TSSAA's members may be public schools does not satisfy this test. *McCormack*, 845 F.2d at 1346. There is no evidence that the decision of TSSAA to enforce its recruiting rule against Brentwood Academy was compelled or influenced by government regulation which would justify attributing the action of TSSAA to the state. *Rendell-Baker*, 457 U.S. at 841; *Ponce v. Basketball Federation of the Commonwealth of Puerto Rico*, 760 F.2d 375, 379 (1st Cir. 1985).

The state of Tennessee has elected not to insert itself into an area where its power is not needed. Tennessee has enjoyed a successful 75 year evolution of interscholastic athletic competition among public, private, and parochial schools without state government interference. Throughout this time, Tennessee has opted not to impose government regulations. Other states have decided differently. The state of Tennessee should be

free to allocate its resources elsewhere rather than being forced to take constitutional responsibility for the private actions of TSSAA.

CONCLUSION

Amicus curiae Southeast Law Institute acknowledges that an association like TSSAA "may make rules to which the school who wishes to participate must agree, otherwise, they should not join the association." *Amicus curiae* Southeast Law Institute brief p. 11. Brentwood Academy joined TSSAA of its own volition, renewed its membership annually, and agreed to comply with the TSSAA by-laws and the decisions of the Board of Control. Brentwood Academy wants to be a member of an organization of 350 schools, all of which have voluntarily agreed to play by the same set of rules, so that it can call itself the TSSAA state football champion. At the same time, Brentwood Academy wants to enjoy the luxury of rewriting to suit itself those rules it does not like, despite the wishes of the other 349 member schools in the association. Brentwood Academy wants to win TSSAA state football championships playing by its own rules.

Ultimately, the various tests for state action serve as guides for determining whether the private party's action is actually an exercise of state government power. In this case, TSSAA's power to enforce its recruiting rule against Brentwood Academy did not flow from the state of Tennessee. TSSAA's power flowed from Brentwood Academy's voluntary membership in TSSAA.

To borrow a phrase from a district court decision relied on by the Petitioner, the assertion that TSSAA acted under color of state law is "empty formalism."

Communities for Equity v. MHSAA, 80 F.Supp. 2d 729, 734 (W.D. Mich. 2000). Carter and TSSAA did not act under color of state law in the enforcement of the TSSAA recruiting rule against Brentwood Academy. The decision of the Sixth Circuit should be affirmed.

Respectfully submitted,

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